AIDEAH COMMUNICATION SDN BHD v. THE NEW STRAITS TIMES PRESS (M) BHD

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
HASHIM HAMZAH JCA
LIM CHONG FONG JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1274-07-2021]
5 MARCH 2024

Abstract – *'Reasonable endeavour' in a contract's clause, which is to be contrasted with 'best endeavour', requires a party to take steps a reasonable person in the circumstances would take. 'Reasonable endeavour' is not an unconditional and absolute undertaking or warranty.*

CONTRACT: *Agreement – Revenue sharing publication agreement – Claim and counterclaim – Editorial and advertisements in newspapers – Claim for payments for commissions and counterclaim for counter surcharge for shortfall of minimum guaranteed sum – Whether there was promise on advertising revenue – Whether there was unilateral reduction in advertisement rates – Principles of contra proferentem and reasonable endeavours*

The present appeal pertained to disputes that arose from a revenue-sharing publication agreement. The appellant was a company founded and managed by a veteran motoring journalist, who was formerly a journalist employed by the respondent, a publisher of newspapers. Since 2003, the respondent appointed the appellant to provide editorial contents and secure advertisements for the respondent's New Straits Times and New Sunday Times newspapers, entitled 'Cars, Bikes and Trucks'. Since 2007, the respondent likewise appointed the appellant to provide editorial contents and secure advertisements for the respondent's Berita Harian and Berita Mingguan newspapers entitled Berita Harian Auto. Towards this end, the parties executed several agreements. Upon the expiry of the agreement in 2013 ('2013 agreement'), in 2016, the appellant continued providing editorial and secure advertisements for the respondent pursuant to a month-to-month agreement until a new agreement was executed, which superseded the 2016 month-to-month agreement. In 2016, the appellant pursued payments from the respondent for commissions totalling RM1,199,874.22 ('commission invoices'). The respondent also pursued payment from the appellant on counter surcharge invoices totalling RM1,589,947.73 for shortfall of minimum guaranteed sum ('MGS') pursuant to the 2013 agreement. This dispute resulted in the appellant initiating a claim in the High Court while the respondent counterclaimed. The High Court dismissed the appellant's claim and allowed the respondent's counterclaim. Hence, the

present appeal by the appellant. In gist, the appeal centred on the MGS of the advertising revenue promised by the appellant to the respondent as well as the appellant's unilateral reduction in advertisement rates given to advertisers in the New Straits Times, New Sunday Times and Berita Harian.

Held (allowing appeal)
Per Lim Chong Fong JCA delivering the judgment of the court:

(1) The 2013 agreement was a formal document that was drafted by the respondent. It superseded the earlier agreements made between the parties pre-2013. In the circumstances, the 2013 agreement must be construed as a whole within its four corners that reasonably reflected business common sense. The dominant provision when read as a whole contextually was cl. 4.3 which plainly provided that the appellant was only required to use reasonable endeavour to ensure that the MGS was met. In other words, it was not an unconditional and absolute undertaking or warranty on the part of the appellant to meet the MGS. Even if the provisions in cls. 1 and 4 of the 2013 agreement were ambiguous, they must nonetheless be read *contra proferentem* and construed against the respondent. The respondent had not led sufficient evidence to satisfy the court that the appellant did the not use its reasonable endeavour required under cl. 4.3 of the 2013 agreement to find any liability on the part of the appellant in justification of its set off and counterclaim on this aspect. The High Court Judge ('HCJ') seriously erred in finding liability against the appellant. The appellant was not liable to the respondent for the failure to meet the MGS, pursuant to the 2013 agreement. (paras 27, 28, 32, 35 & 37-39)

(2) The parties' dispute was with regard to whether the respondent knew and consented to the reduction in the advertisement rates, particularly on the part of the respondent's head of classified ads ('DW2'). The HCJ made a finding of fact that the appellant did not respond to DW2's email queries seeking for proof of the respondent's formal acceptance in writing of the advertisement rate reduction. As a result, the appellant was found in breach of cl. 7.5 of the 2013 agreement. The HCJ placed too much reliance on the re-examination answers which dealt with DW2's subsequent emails that were only sent out long after the event when the advertisements were already placed. They were sent out as an attempted defence to the appellant's claim and to mount a counterclaim done in afterthought. The respondent must be estopped from changing its stand that there was no approval obtained from the respondent, as required pursuant to cl. 7.5 of the 2013 agreement. The respondent *vide* DW2, gave his written approval and/or acquiesced in the reduction/concession of the advertisement rate at the material time. The HCJ made a misdirection by finding in favour of the respondent on the unilateral reduction of the advertisement rate given to the advertisers by the appellant. (paras 41-42 & 44-46)

(3) The order of the High Court was set aside. Consequently, judgment was entered in favour of the appellant's claim against the respondent for the sum of RM1,178,369.97 together with interest. (paras 49 & 50)

Case(s) referred to:

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Heisler v. Anglo-Dal Ltd [1954] 1 WLR 1273 ***(refd)***

Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor & Another Appeal [2016] 8 CLJ 804 CA ***(refd)***

Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2016] 4 CLJ 813 FC ***(refd)***

Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd [2016] 8 CLJ 211 CA ***(refd)***

Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] CLJU 1416; [2012] 1 LNS 1416 CA ***(refd)***

Perwaja Terengganu Sdn Bhd v. Maju Holdings Sdn Bhd [2019] CLJU 1061; [2019] 1 LNS 1061 HC ***(refd)***

Rhodia International Holdings Ltd And Anor v. Huntsman International LLC (2007) All ER (D) 264 (Feb) ***(refd)***

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***

The Pacific Bank Bhd v. Kerajaan Negeri Sarawak [2015] 3 CLJ 717 FC ***(refd)***

YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 92

For the appellant - Bahari Yeow Tian Hong & Alex Choo Wen Chun; M/s Rosli Dahlan Saravana & Partnership

For the respondent - Saritha Devi Kirupaleni & Long Mohd Nor Adman; M/s Zaid Ibrahim & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCvC-268-05-2017 (overruled).]

Reported by Lina E

JUDGMENT

Lim Chong Fong JCA:

Introduction

[1] This is a trial appeal pertaining to disputes that arose from a revenue-sharing publication agreement.

[2] The appellant/plaintiff is a company founded and managed by a veteran motoring journalist.

[3] The respondent/defendant is also a company and publisher of the New Straits Times, New Sunday Times, Berita Harian and BH Ahad newspapers.

[4] The founder of the appellant is formerly a journalist employed by the respondent.

[5] We heard the appeal on 16 November 2023 and thereafter adjourned our decision to deliberate on the arguments put forth by the parties.

[6] Now having done so, we give our decision below together with our supporting grounds thereto.

Background

[7] Since 2003, the respondent appointed the appellant to provide editorial content and secure advertisements for the respondent's New Straits Times and New Sunday Times newspapers entitled "Cars, Bikes and Trucks" ("CBT").

[8] Furthermore, since 2007, the respondent likewise appointed the appellant to provide editorial content and secure advertisements for the respondent's Berita Harian and Berita Mingguan newspapers entitled Berita Harian Auto ("AUTO").

[9] Towards this end, the parties executed the following agreements:

(i) 2003 CBT agreement dated 18 June 2003 for the period between 1 June 2003 to 31 May 2006;

(ii) 2007 CBT agreement dated 21 March 2007 for the period between 1 June 2006 to 31 May 2009;

(iii) 2007 AUTO agreement dated 3rd October 2007 for the period 13 July 2007 to 12 July 2009;

(iv) 2010 (CBT & AUTO) agreement dated 19 March 2010 for the period 1 January 2010 to 1 January 2013; and

(v) 2013 (CBT & AUTO) agreement undated for the period 1 March 2013 to 31 December 2015.

[10] Upon the expiry of the 2013 (CBT & AUTO) agreement ("2013 agreement"), the appellant in 2016 continued providing editorial and secured advertisements for the respondent pursuant to a month-to-month agreement until a new 2016 agreement dated 1 January 2016 until 15 September 2016 was executed which superseded the 2016 month-to-month agreement.

[11] In 2016, the appellant pursued payment from the respondent on Invoice No. IV-246/16 for additional commission for 2010 to 2013 and Invoices No. SO1/02/15, IV-00072, IV-00087 and IV-00102 for outstanding commission for 2015 as well as Invoices No. IV-205/16 & CN 00015, IV-213/16, IV-241/16, IV255/16 and IV-279/16 for outstanding commission for 2016 (collectively "commission invoices") totalling RM1,199,874.22.

[12] The respondent, however, in 2016 also pursued payment from the appellant on counter surcharge Invoices Nos. B290167 and B290168 (collectively "counter surcharge invoices") totalling RM1,589,947.73 for shortfall of minimum guaranteed sum ("MGS") pursuant to the 2013 agreement.

[13] The appellant's commission invoices claim and the respondent's counter surcharge invoices cross claim against each other precipitated into a dispute that resulted in the appellant on 25 May 2017, initiating Kuala Lumpur High Court Suit No. WA-22NCVC-268-05/2017 ("suit").

[14] In the suit, the appellant claimed for the following in para. 87 of the statement of claim:

87. By reason of the foregoing, ACSB claims against NSTP for:

(a) a declaration that the Contract Surcharge Invoices are null and void and unenforceable;

(b) a declaration that the 2012 shortfall clause amount to a penalty and thus; unenforceable;

(c) a declaration that there is a valid and binding 2016 September agreement between the plaintiff and defendant;

(d) a declaration that the defendant had wrongly repudiated the 2016 September agreement;

(e) the outstanding sum of RM1,408,050.32 due and owing to the plaintiff by the defendant as listed in paragraph 86 of the plaintiff's statement of claim;

(f) loss of profit for June 2016 to September 2016 for the sum of RM439,441.62;

(g) special damages of RM197,373.30;

(h) general damages;

(i) interest on damages awarded at such rate as the Court deems fit from the date of filing the statement of claim until full payment;

(j) costs on solicitor and client basis; and

(k) such other relief deemed fit by the Court.

[15] The respondent in turn counterclaimed for the following in para. 63 of its amended statement of defence and counterclaim:

63. Wherefore, the defendant claims against the plaintiff for:

(a) a declaration that the Shortfall Invoices have been validly issued;

(b) a declaration that the shortfall clause in 2013 agreement does not amount to penalty;

(c) a declaration that the plaintiff have the duty to fulfil the stipulated MGS in the 2013 agreement;

(d) a declaration that the 2016 agreement never materialized and therefore not valid and enforceable;

(e) a declaration that all copyright material including the domain names for CBT and AUTO belong to the defendant and, for the plaintiff to surrender any copyright materials under the plaintiff's possession and, the said domain names to the defendant within fourteen days from the date of the Court judgment;

(f) the sum of RM57930.33 being the outstanding balance due and owing from the Shortfall Invoices;

(g) the sum of RM21,504,75 being the amount due for rental, management fee and utilities from January to May 2016;

(h) loss of profits of RM284,068.00 for CBT and RM75,000.00 for AUTO due the plaintiff's use of lower advertisement rates than those provided in the 2010 and 2013 agreements;

(i) damages to be assessed for the defendant's loss of advertisement revenue due to the plaintiff's conduct in providing cheap advertisement through their CBT and AUTO columns;

(j) general damages;

(k) interest;

(l) costs on indemnity basis;

(m) such other relief deemed fit by the Court.

In The High Court

[16] The appellant primarily contended that the appellant's unpaid commission invoices claim is not really disputed by the respondent. However, the respondent's cross-claim for the respondent's counter surcharge invoices in set off against the appellant's aforesaid claim is bad by reason that the respondent's cross-claim is a penalty as well as a purported guaranteed sum compensation that is unenforceable.

[17] Additionally, the appellant contended that the appellant's lower chargeable rate concession afforded to advertisers in the CBT and AUTO publications now pursued by the respondent in the suit were informed to the respondent who had acquiesced to the concession.

[18] Both these contentions of the appellant were, however, flatly denied by the respondent who took a contrary stance relying upon the 2013 agreement and conduct of both parties.

[19] The learned High Court Judge decided as follows in the grounds of judgment ("judgment"):

8. Courts Judgment And Grounds Of Judgment

8(1) It is undisputed that the plaintiff had provided editorial and advertisement services in the defendant's newspapers, New Straits Times and New Sunday Times from 2003 and defendant's Berita harian and Berita Mingguan from 2007 onwards.

8(5) The plaintiff had successfully achieved the required MGS and have been paying the defendant the required advertising revenue with the exception of the year 2015. Despite a shortfall for 2005, the defendant did not make any claim as the shortfall was nominal and negligible.

8(6) The defendant was found by the Court to have validly exercise its inherent right to set off the plaintiff's Shortfall Invoices No. B290168 and B290167 respectively for the sum of RM1,257,375.64 and RM332,572.10 as issued by the defendant against the outstanding sum for the year 2015 and 2016.

8(7) The defendant's legal entitlement to a set off was premised on the plaintiff's clear failure to fulfil its contractual obligation in which it was for the plaintiff to achieve the stated MGS and consequently to remit the required sum to the defendant in accordance to the agreed ratio of parties' Revenue Sharing agreement pursuant to Clause 4 of the parties' 2013 agreement.

8(8) In finding that the plaintiff have failed to prove its case or claim on a balance of probability, the Court concluded that the plaintiff, pursuant to parties'2013 agreement was legally obligated to fulfil the 40%:60% Revenue Sharing as were unequivocally and mutually agreed by the parties under the 2013 agreement.

8(9) The Court further concluded that the plaintiff's case of the agreed MGS to be mere projection and soft target is legally unfounded, without merit and self-serving.

8(10) The parties' 2013 agreement contained a specific definition of the MGS wherein, the plaintiff had guaranteed the defendant of its attainment of the required MGS. Further, pursuant to clause 4.5 of the 2013 agreement provide as follows: ...

8(11) Based on the explicit provision, the plaintiff was legally obligated to pay to the defendant any shortfall sum within the timeline of thirty days. The defendant was further entitled to withhold all monies from the plaintiff until the plaintiff's full settlement of the shortfall sum.

8(12) Under the 2013 agreement, the defendant was clearly obligated to pay the plaintiff for Net Advertising Revenue from advertisements appearing under the heading of CBT or AUTO respectively in the New Straits Times, Sunday Times, and Berita Harian. Pursuant to clauses 4.1 and 4.2 of the 2013 agreement which provide as follows: ...

8(13) Parties clearly understood and were governed by the express terms of the agreement which they had been agreed to, given that, prior to the 2013 agreement, there were three similar Revenue Sharing agreements which had been entered and executed by both parties ...

8(14) In all of the agreements, the plaintiff was imposed by the defendant the obligation to source customers for advertisements in the defendant's CBT in the New Straits Times and AUTO in the Berita Harian publication for which the plaintiff was paid commission by the defendant. In this

respect, no payment was required to be paid by the defendant for the plaintiff's services in the agreed ratio unless the plaintiff have successfully attained the stated MGS.

8(15) The plaintiff's obligations to fulfil the stated MGS constitute a primary and legal obligation of the plaintiff which mandated the plaintiff to achieve the stated MGS in the *ratio* of 40:60. The MGS formed an integral and fundamental component of the parties Revenue Sharing agreement since the inception of the parties first Revenue Sharing agreement of 2003.

8(16) Parties' Revenue Sharing may be varied subject to an increase every three years by way of parties' negotiation and as such, the parties mutual execution of the subsequent 2007, 2010 and 2013 agreements.

8(17) Given that the MGS formed the crux of the parties' revenue sharing agreements, it was undisputedly, the plaintiff's primary obligation to fulfil the required MGS and make consequent payment to the defendant in the manner and term as expressly provided in clause 4.3 of the 2013 agreement.

8(18) Given the plaintiff's non-attainment of the MGS and non-remittance of the advertisement revenue to the defendant, the defendant's issuance of Shortfall Invoices to the plaintiff was found to have been properly and regularly made, which given the plaintiff's failure, entitled the defendant to invoke its inherent right to set off the plaintiff's Shortfall Invoices.

8(19) Furthermore, the Shortfall Invoices and MGS clauses were clearly not punitive in effect as it had been in place and was mutually negotiated and executed by parties since the inception of its 2003 agreement. It was implemented during the three years duration of each agreement without objection or complaint from the plaintiff, nor was any issue of its irregularity or invalidity challenged by the plaintiff.

8(20) Upon expiration of parties. 2013 agreement in 2015, the plaintiff had been properly notified by the defendant of the defendant's intention not to continue with further agreement. Furthermore, at a meeting on 19 January 2016 held to discuss the plaintiff's outstanding position, the plaintiff had pleaded for the defendant's waiver and consideration. Consequent to the defendant's rejection, the plaintiff had counteroffered an instalment payment package up to six months to settle the aforesaid Shortfall Invoices.

...

9. Counterclaim Appeal

9(4) Given the plaintiff's failure to achieve its fundamental obligation to fulfil the stated MGS, the defendant is accordingly entitled to issue the Shortfall Invoices against the plaintiff amounting to RM1,589,947,74.

9(5) It is also clear that the defendant suffered loss of profit consequent to the plaintiff's wrongful imposition of lower advertisement rates than rates that were agreed by parties in the 2013 agreement.

A

9(6) In so doing, plaintiff had without the defendant's knowledge and approval represented lower advertising rates. Pursuant to clause 7.5 of the 2013 agreement, advertisement rates for Colour Ads is charged RM30/ column centimetre whilst advertisement in Black and White Ads is RM33/column centimetre and made subject to a surcharge of RM10,000.00.

B

9(7) Further, pursuant to Annexure A and B respectively for CBT and AUTO, the defendant had successfully substantiated its claim for profit loss. The defendant further substantiated its claim of plaintiff's unilateral discount on advertisement rates by adducing documentary evidence namely, newspapers articles, invoices and media orders.

C

9(8) The reduced advertisement rates were never referred or agreed to by the defendant. The plaintiff failed to respond to the defendant's Head of the Classified Advertising Department's (DW2) email enquring the plaintiff's unilateral imposition of lower advertisement rated *vide* email dated 25 May 2015. DW2 had re-emailed plaintiff's director, PW1 to enquire for the plaintiff's low advertisement charges.

D

9(9) Plaintiff is found to have further failed to respond to the defendant's email dated 22 June 2015 issued following the defendant's discovery of a substantial difference in the total sum of RM23,300.00 for the CBT Quarterly Review.

E

9(10) Given the plaintiff's failure to respond to all the defendant's enquires on its lower advertisement rates, the plaintiff therefore had in breach of parties' 2013 agreement which clearly provided for the specific advertisement rates to be complied by the plaintiff.

F

9(11) There was no evidence of plaintiff's request to the defendant seeking a reduced advertisement rate. Based on the testimony of DW2, both parties must agree to the imposition of a lower advertisement. Plaintiff was required to request the defendant in writing where the new lower rate must be subject to the defendant's approval.

G

9(12) Further, there was a requirement for any variation of the 2013 agreement be made in writing. As such, given the clear absence of plaintiff's written request to the defendant or, the defendant's approval for lower rates, the plaintiff is therefore was in undisputed breach of parties' 2013 agreement in its unilateral imposition of the reduced rates without the defendant's knowledge or approval.

...

H

9(17) In its entirety, the Court's award of RM100,000.00 as the defendant's (*sic*) general damages to the defendant is considered to be a fair and reasonable quantum and not excessive given the prevailing circumstances and peculiarly of the defendant's loss and damage.

I

9(18) The Court further took cognisance of parties' long established business relationship since 1998 and find no legitimate excuse for the plaintiff to justify its breach and non-compliance of the MGS, non-payment liability for the Shortfall Invoices and its unilateral imposition of lower than prescribed advertisement rates.

Conclusion

10(1) Therefore, given the foregoing grounds, the plaintiff was found to have failed to prove its claim for declaratory orders that the Contractual Surcharges/Invoices were null and void. The Shortfall Clause in the parties'2013 agreement were not null and void on the ground of being a penalty but, were in effect binding and enforceable against the plaintiff.

10(2) The MGS was not a soft target but a primary and fundamental obligation to fulfil the parties' agreements. Parties own non-performance and non-compliance of the MGS for the CBT and AUTO has caused the defendant's termination of parties 2013 agreement in 2015.

10(3) The Court accordingly dismissed the plaintiff's prayers in paragraph 87(a) to (k) of the plaintiff's Statement of Claim and allowed the defendant's Counterclaim for prayers in paragraph 63(a) to (h) of the defendant's Amended Statement of Defence and Counterclaim with costs of RM60,000.00 subject to allocator fees of 4%.

[20] The appellant is discontented with the judgment; hence the appellant on 30 June 2021 lodged its appeal to the Court of Appeal.

Findings Of This Court

[21] Before us, the parties basically re-submitted their respective arguments advanced in the High Court. In gist, they centred on the MGS of advertising revenue promised by the appellant to the respondent as well as the appellant's unilateral reduction in advertisement rates given to advertisers in the New Straits Times, New Sunday Times and Berita Harian.

[22] Since this is an after-trial judgment, our task is merely that of review based on the record of appeal.

[23] In *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] CLJU 1416; [2012] 1 LNS 1416, Abdul Wahab Patail JCA held as follows with emphasis added by us:

[4] Both parties began their submissions with the clear understanding that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts in the trial judge. They cited this court in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 CA; [1995] 3 MLJ 395 CA. This general principle was adopted by this court in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 and other cases. It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms "intervene" and "interfere" are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.

...

A [7] There is almost no limit to the range within which cases in court may vary. At one end there are cases that involve solely questions of law, and no facts are disputed. On the other there are cases that involve no law but all the facts are disputed. Within these cases there may be cases with disputed facts that involve solely interpretation and inferences leading to a conclusion on a finding on the disputed fact, and there may be other
B cases with disputed facts that involve solely oral evidence and the finding depends entirely upon an assessment of the credibility of witnesses who testified and were tested before the trial judge.

[8] *Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason*
C *of having seen and heard the witnesses testify and being tested before him, and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge*, for example:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the
D evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course or events affirmed by the trial judge could not have occurred;
E

(e) *the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts*; or

(f) *the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the*
F *correct questions would have arrived at the same conclusion*;

an appellate court will intervene to rectify that error so that injustice is not occasioned.

(emphasis added)

[24] Moreover, in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004]
G 4 CLJ 309, Steve Shim CJ (Sabah and Sarawak) held as follows with emphasis added by us:

In gist, the pivotal question raised by the appellants was whether the term "insufficient judicial appreciation of the evidence" used by the Court of Appeal constituted a new test for appellate intervention. We think it is
H important to examine this proposition in the light of what the Court of Appeal had said in its judgment beginning from para. 27 which we have reproduced earlier but repeated herein for the purpose of emphasis. It states:

> Suffice to say that we re-affirm the proposition that an appellate
I court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been

no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.

And the Court of Appeal went on to explain in para. 28 as follows:

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case.

In making the observations above, the Court of Appeal cited the following cases: *Tindok Besar Estate Sdn Bhd v. Tinjar Co.* [1979] 1 LNS 119; [1979] 2 MLJ 229; *Muniandy & Ors. v. Public Prosecutor* [1966] 1 LNS 110; [1966] 1 MLJ 257; *Dr. Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153, *Yusoff bin Kassim v. Public Prosecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376; *Rex v. Low Toh Cheng* [1941] MLJ 1; *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176; [1974] 1 MLJ 110; *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165; *Armagas Ltd v. Mundogas SA ("The Ocean Frost")* [1985] 1 L1 R 1; *State of Rajasthan v. Hanuman* (AIR) [2001] SC 282, 284; *Tek Chand v. Dile Ram* (AIR) [2001] SC 905.

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence.

In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country.

(emphasis added)

See also *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1.

[25] On this premise, we find it pertinent to reproduce the following clauses in the 2013 agreement:

1. Definitions and Interpretation

In this agreement, unless the context otherwise requires, the following expressions shall have the following meanings:

"Minimum Guaranteed Sum" means the net Advertising Revenue for each contract year guaranteed by ACSB to be received by NSTP as per Clause 4.1 and 4.2 which sum shall exclude agency commission and government service tax incurred in relation thereto and the one percent (1%) discount for early settlement.

...

"Net Advertising Revenue" means advertising revenue from the sale of advertising spaces in CBT and AUTO which revenue shall exclude agency commission and government service tax incurred in relation thereto and one percent (1%) discount for early settlement.

...

4. The Contract Sum and Payment of Revenue

4.1 NSTP shall pay ACSB monthly the following percentage sum of the Net Advertising Revenue from advertisements appearing in CBT collected for the corresponding month:

Year 2015: Forty percent (40%) of Net Advertising Revenue for sales at a minimum of RM3,858,000.00 (RM3.858 Million) per annum.

Fifty percent (50%) on every additional cent above RM4,000,000.00 (RM4.4 Million) per annum.

4.2 NSTP shall pay ACSB monthly the following percentage sum of the Net Advertising Revenue from advertisements appearing in AUTO collected for the corresponding month:

Year 2013-2015: Thirty Five percent (35%) of Net Advertising Revenue for sales at minimum of RM1,400,000.00 (RM1.4 Million) per annum.

Forty percent (40%) on every additional cent for sales between RM1,500,000.00 Million to RM2,000,000.00 per annum.

Fifty percent (50%) on every additional cent above RM2,000,000.00 (RM 2 Million) per annum.

4.3 ACSB shall use reasonable endeavour to ensure that the Minimum Guaranteed Sum as stipulated in clause 4.1 and 4.2 is achieved within each contract year.

4.5 NSTP shall review the minimum guarantee sum of sixty percent (60%) of the net advertising revenue for CBT and sixty five percent (65%) for AUTO, whichever is higher, at the end of each contract year. Should there be a shortfall in the minimum guarantee payment by ACSB, NSTP

shall retain the right to withhold payments to ACSB of the following months such underpaid amount is settled, and during the such period, ACSB shall undertake to procure to settle the underpaid amount within a period of thirty (30) days.

7. Obligations of ACSB

7.5 Advertising Rates:

(a) ACSB is only authorised to sell based on the advertising rates for CBT and Auto of between Ringgit Malaysia Thirty (RM30.00) for Colour Ads and Ringgit Malaysia Thirty-three (RM33.00) for Black and White Ads per column centimetre;

(b) ACSB must first obtain approval from the Marketing Department of NSTP accordingly:

(i) if such advertising rate is below the rate as stated in clause 7.5(a) hereinabove and;

(ii) if advertisement is non-motor related.

14. Entire agreement

This agreement herein constitute the entire agreement in respect of the subject matter hereof between the parties hereto and supersedes all previous negotiations, commitments and writing, and may not be changed and modified in any manner, orally or otherwise, except by an instrument in writing signed by duly authorised officers, or representations of each party hereto.

[26] The law on interpretation of contracts is trite. In the leading case of *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177, Zainun Ali FCJ held as follows with emphasis added by us:

Principles Of Construction

[26] The principles of interpretation of contract are as familiar as any canons of construction would be to legal practitioners.

[27] In recent times, the restatement of principles in the landmark case of *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, *912-913 "(ICS)" provides a helpful starting point for the consideration of the relevant principles*. The judgment of Lord Hoffmann is as reproduced below, where His Lordship stated that:

> ... I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated.

The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. *The principles may be summarised as follows*:

(1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*.

(2) *The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man*.

(3) *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification*. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax*: see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1 508.

(5) *The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had*. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201:

> *If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense*.
>
> (emphasis added)

See also *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813.

[27] It is not in dispute that the 2013 agreement is a formal document that was drafted by the respondent. It superseded the earlier agreements made between the parties pre-2013.

[28] In the circumstances, the 2013 agreement must be construed as a whole within its four corners that reasonably reflect business common sense. A

[29] The crux of the dispute on the MGS to us is that the respondent views the MGS as an unconditional and absolute warranty or undertaking on the part of the appellant to meet the MGS in terms of advertising revenue for the year whereas the appellant views the MGS as merely an obligation of usage of reasonable endeavour to meet the MGS for that year. B

[30] In this respect, we observed that Somerville LJ held as follows in *Heisler v. Anglo-Dal Ltd* [1954] 1 WLR 1273 with emphasis added by us:

> The judge held that the plaintiff's construction succeeded, and I have come to the conclusion that he was righty. *The word "guarantee" is often used other than its legal sense. An example of the word meaning simply an undertaking by the contracting party can be found in Barker v. Andrew*. Devlin J said: C
>
> > Again, I think one has to bear in mind that commercial men do not look at these things quite from the lawyer's point of view. *To a lawyer to say: 'I guarantee that I will perform my contract" is quite worthless, but a commercial man would regard the guarantee, perhaps furnished in a proper form of letter, as having some value as underlining, as it were, the promise that had been undertaken. He does not think in terms of damages, liquidated damages, penalty clauses and the rest of it; he says to himself, "I have got it in writing and if for any reason these goods do not come forward I will get 10 per cent of their price." And he may well think it is a valuable thing*. D E
>
> (emphasis added)

[31] Moreover, in *The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717, Zainun Ali FCJ held as follows with emphasis added by us: F

> [94] *Thus the liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates.*
>
> [95] *It is our view that a guarantor is entitled to insist that the terms of his obligation are strictly observed by the parties; he cannot be made liable for more than he had undertaken or bargained for*. G
>
> [96] In this connection there is a need to distinguish between limiting a right and limiting the enforcement of that right.
>
> (emphasis added)

See also *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2)* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187; [1989] 3 MLJ 155. H

[32] We have carefully read and considered the wordings in cls. 1 and 4 of the 2013 agreement. The dominant provision when read as a whole contextually is cl. 4.3 which plainly provides that the appellant is only required to use reasonable endeavour to ensure that the MGS is met. In other words, it is not an unconditional and absolute undertaking or warranty on the part of the appellant to meet the MGS. I

[33] We are fortified by the views of Vernon Ong Lam Kiat JCA (later FCJ) in *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211; [2017] 2 MLJ 819 as follows with emphasis added by us:

> [32] *The key words underpinning the obligation in cl. 3.1 are "use their best endeavours" and in cl. 18 "take such steps as may be necessary". In our view, the key words do not impose any obligation on PKNS to obtain the issue document of title to the subject land. All that the clauses require of PKNS is that PKNS use its best endeavours or take such steps as may be necessary to obtain the document of title.*
>
> [33] As a general rule, the words of an instrument must be construed according to their natural meaning. Where the language of a document is plain and unambiguous and applies accurately to existing facts then the intention of the parties to the document should be gathered from the language of the document itself. No amount of acting by the parties can alter or qualify words which are plain and unambiguous: see s. 94 of the Evidence Act 1950; *North Eastern Railway Company v. Hastings* [1900] AC 260 (PC)
>
> (emphasis added)

See also *Perwaja Terengganu Sdn Bhd v. Maju Holdings Sdn Bhd* [2019] CLJU 1061; [2019] 1 LNS 1061.

[34] We also observed that an obligation to use reasonable endeavour is less stringent than to use best endeavour as held in *Rhodia International Holdings Ltd And Anor v. Huntsman International LLC* (2007) All ER (D) 264 (Feb). According to the appellant, it is merely a soft target to be met.

[35] In any event and even if the provisions in cls. 1 and 4 of the 2013 agreement are ambiguous, they must nonetheless be read *contra proferentem* and construed against the respondent since the 2013 agreement was proffered by the respondent following *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731.

[36] We are mindful that the respondent has implored upon us to see the pre-2013 agreements to have a better understanding of the consensus of the parties, particularly on the MGS. We are however disinclined and refrain from so doing by virtue of cl. 14 of the 2013 agreement as well as s. 92 of the Evidence Act 1950. It is also clear that by cl. 14 of the 2013 agreement is an entire agreement that overrides previous agreement made between the parties.

[37] For completeness, we find that the respondent has also not led sufficient evidence to satisfy us that the appellant did not use its reasonable endeavour required under cl. 4.3 of the 2013 agreement to find any liability on the part of the appellant in justification of its set off and counterclaim on this aspect.

[38] In the premises, we find appellate intervention is justified here by reason that the learned judge seriously erred in finding liability against the appellant as seen in paras. 8(13) to 8(18) of the judgment. There is the unmistakable insufficient appreciation of the evidence because no consideration was given at all to cl. 4.3 of the 2013 agreement. This is a non-direction that is tantamount to a fatal misdirection.

[39] Consequently, we find and hold that the appellant is not liable to the respondent for failure to meet the MGS pursuant to the 2013 agreement.

[40] Moving next to the unilateral reduction/concession of advertisement rate by the appellant, it is not in dispute that the appellant, as a matter of fact, accepted advertisements for advertisers based on reduced advertisement rate contrary to that stipulated in cl. 7.5 of the 2013 agreement.

[41] The parties' dispute, however, is with regard to whether the respondent knew and consented to the aforesaid reduction in the advertisement rates, particularly on the part of DW2, the respondent's head of classified ads.

[42] The learned judge made a finding of fact in paras. 9(6) to 9(12) of the judgment, particularly in that the appellant did not respond to DW2's email queries dated 25 May 2015 and 22 June 2015 seeking for proof of the respondent's formal acceptance in writing of the advertisement rate reduction. As a result, the appellant was found in breach of cl. 7.5 of the 2013 agreement.

[43] Although the appellate court is generally slow to disturb findings of fact, we however find that the learned judge has also failed to have sufficiently appreciated the evidence in that DW2 clearly gave contradictory oral evidence under cross-examination as follows:

> Q: RM3,000.00, right? And you see your signature on, at page 503, Mr Giam?
>
> A: Yes
>
> Q: And you noted there "OK". So, this was approved by your department?
>
> A: Yes.
>
> Q: Yes, And the same thing goes on for, can I take you very quickly so that we don't waste too much, just very quickly, 506 you see your signature there, 509, 512. This all refers to the items in page 32. No. 1, No. 2, No. 3, ya? And so on. So, will you agree, Mr Giam, that without, that, sorry, that NST, the defendant, had agreed to all these rates that were placed by the advertising agency for advertisements in the media order, CBT?
>
> A: Can you repeat, Sir?

A Q: Do you agree, Mr Giam, that NST had agreed to all, to the advertising rate stated in those, in all the media orders that were submitted to NST?

A: It could be partially. It could be partially

...

B Q: Just now we said there were about 100s of advertisement a year for each publication. Do you recall Mr Giam you rejecting any because they didn't meet because it was not per the rates in the agreement?

A: I did not reject.

C Q: You did not reject any of them.

...

Q: If NST didn't agreed to the rates, Mr Giam, then the advertisements won't have been published?

D A: Correct.

Q: Correct. And in this case, all the advertisements placed by, for CBT and Berita Harian AUTO were all published?

A: Yes.

E **[44]** In the circumstances, we find that the learned judge placed too much reliance on the re-examination answers which dealt with DW2's subsequent emails that were only sent out long after the event when the advertisements were already placed. We find that they were sent out as an attempted defence to the appellant's claim and to mount a counterclaim done in afterthought.

F **[45]** We, therefore, find that the respondent must hence in the circumstances be estopped following *Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor & Another Appeal* [2016] 8 CLJ 804 from changing its stand that there was no approval obtained from the respondent as required pursuant to cl. 7.5 of the 2013 agreement. The respondent *vide* DW2 gave his written approval and/or acquiesced in the reduction/concession of the G advertisement rate at the material time.

[46] For this reason, we again find that appellate intervention is justified here in that the learned judge made a misdirection by finding in favour of the respondent on the unilateral reduction of the advertisement rate given to the H advertisers by the appellant.

[47] Finally, and as contended by the appellant, we also find that there is no basis for the respondent to counterclaim and succeed in general damages of RM100,000 as awarded by the learned judge based on our findings in paras. [39] and [46] above.

I

[48] Having said that, we take note that the appellant has confined and reduced its claims prayed in its statement of claim at the close of the trial in the High Court as well as conceded to certain of the respondent's counterclaims which are undisputed such as on rental agreement expenses. We find that these have been duly accounted for by the appellant and the appellant's claim has thus been re-computed totalling to only RM1,178,369.97 made up of the unpaid commission invoices less the conceded counterclaims as summarised in NSTP's latest summary of charges and payables.

Conclusion

[49] For the foregoing reasons, we unanimously allow the appeal and the judgment and order of the High Court dated 18 June 2021 is set aside.

[50] Consequently, judgment is entered in favour of the appellant's claims against the respondent for the sum of RM1,178,369.97 together with interest at the rate of 5% per annum from the filing of the suit until the date of full payment with costs of RM80,000 here and below subject to the allocatur.

[51] For the avoidance of doubt, the respondent's other counterclaims against the appellant that have not been conceded are dismissed.